United Nations AT/DEC/1212

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1212

Case No. 1301: STOUFFS Against : The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Brigitte Stern, Vice-President, presiding; Mr. Omer Yousif Bireedo; Mr. Dayendra Sena Wijewardane;

Whereas, on 16 July 2003, Nadejda Stouffs, a former staff member of the United Nations, filed an Application containing pleas which read as follows:

"**PART II. PLEAS**

1. I contest the final decision of the Secretary-General ... in which he declines to follow the recommendations contained in the report of the Geneva [Joint Appeals Board (JAB)].

I ask the United Nations Administrative Tribunal a) to rescind the Secretary-General's decision, b) to endorse the recommendations of the [JAB] and c) to order the United Nations Office at Geneva [(UNOG)] to pay the sums overdue and the appropriate interest thereon at the rate of 8 per cent a year from ... the date of my retirement. ...

2. I ask to be awarded damage compensation for injury resulting from the failure of [UNOG] to abide by Staff Rules and Regulations, non-observance of language teachers' contract conditions and delay of payment of a) pension benefits ..., b) the final pay for the period from 1 - 7 April 2000 ..., c) annual leave pursuant to staff rule 105.1 ... I also ask for the appropriate interest at the rate [of] 8 per cent a year, on these three delayed payments.

3. I ask for the reimbursement of expenditures incurred in the preparation of the [appeal] to the Geneva JAB and in the preparation of this [Application] to the Administrative Tribunal, including clerical costs, photocopies, telephone calls and postal expenses, in an amount of approximately CHF 500 plus appropriate interest thereon.

4. I request, pursuant to article 7, para. 3 (e) of the Rules of the Unit Nations Administrative Tribunal, addit.onal relief, including reasonal attorney's costs."

Whereas at the request of the Respondent, the President of the Tribu granted an extension of the time limit for filing a Respondent's answer until November 2003 and periodically thereafter until 30 April 2004;

Whereas the Respondent filed his Answer on 30 April 2004;

Whereas the Applicant filed Written Observations on 28 September 2004;

Whereas the statement of facts, including the employment record, contained the report of the JAB reads, in part, as follows:

"**Introduction**

...

[Applicant's] Professional Record

... The [Applicant] entered the service of the United Nations in Geneva, on January 1978, as a Russian teacher in the Training and Examination Sectio on a contract covering the first term of the year ... [Her contract w subsequently renewed.]

... She received a permanent appointment on 1 January 1990.

... She went on retirement as of 7 April 2000.

...

Summary of Facts

...

... On 27 March 2000, in a memorandum to [a] Personnel Officer, t [Applicant] notably highlighted the alleged 'precedent established by t treatment accorded to two staff members who retired in 1989 and 1998, w full leave entitlement'.

... By memorandum dated 3 April 2000, the Chief, Human Resourc Management Service, UNOG, [(HRMS)] answered that '[she was] unable meet [the Applicant's] expectation to be paid for the Easter recess, i.e. until April 2000, [as the latter] would have separated from the Organization on April 2000'. She wrote *inter alia*:

> 'In order to clarify the matter I wish to reiterate that the provisions Administrative Instruction] ST/AI/316 [entitled "Granting of Status Staff Members to Full-time Language Teachers"] of 6 March 198 reproduced as *Geneva/01/157, and Amend.1* remains in effect. T important aspect of this instruction is the granting of the status of st members to full time language teachers under the 100 series of St Rules. The leave entitlement of full time language teachers remai unchanged in accordance with paragraph 3 *for as long as they ha status of staff members*. Once a staff member separates from servi

> he/she ceases to have the status of a staff member effective the date of separation.'

...

[On 30 April 2000, the Applicant returned her unsigned Personnel Payroll Clearance Action Form (P.35 form), to the Chief, HRMS, indicating that she would not sign the form until her leave balance had been included.]

... On 29 May 2000, [the Applicant] reminded the Chief, [HRMS], about her previous request in order 'to take appropriate steps to obtain [her] final payment'.

... On 31 May 2000, the [Applicant] wrote to the Secretary-General requesting him to review the decision by the Administration not to accord her a pro-rata amount of paid leave prior to her retirement effective on 7 April 2000 ...

...

[On 1 August 2000, the Chief, HRMS, urged the Applicant to sign her P.35 form, in order that the P-35 form could be released. The Chief proposed that the Applicant sign the form "without the leave days included", and advised that "signing [her] P-35 [was] not an indication that [she agreed] to the non inclusion of leave days". The Applicant did not sign the form.]

[On 24 August 2000, the Applicant lodged an appeal with the JAB in Geneva.]

[On 5 September 2000, HRMS advised the Applicant that her unsigned P-35 form had been released "for pension purposes only".]

...

... On 12 September 2000, the Chief, Rules and Regulations Unit, OHRM, New York, answered to the Chief, Human Resources Management Service, UNOG, on the request made by the [Applicant] that she be paid not only for accrued annual leave, but also for additional days corresponding to the scheduled break between the terms she had just completed and the beginning of the next term. She wrote *inter alia*:

> 'As of the date [of retirement], the separating staff member is entitled to payment of any annual leave accrued under 105.1, up to a maximum of 60 days, in accordance with staff rule 109.8. This is not altered by the fact that, under special conditions of service set out in Appendix F, teachers work only for 3 terms of 13 weeks during the year. Leave taken during the summer recess and the scheduled breaks in excess of the normal annual leave entitlement is treated as special leave with pay.'

... The above-mentioned answer was transmitted to the [Applicant] on 14 September 2000, who was informed that she was entitled to 'payment of annual leave accrued for the period 1 January 2000 through 7 April 2000, i.e. 8.5 days', minus 3 days of annual leave taken in January.

... By letter dated 2 October 2000 to the Chief, Rules and Regulations Unit, New York, the [Applicant requested the payment of her final entitlements in accordance with] staff rule 105.1.

... On 10 October 2000, ... the [Applicant] contested the decision transmitted to her on 14 September 2000, based on a calculation method, established itself on assumed 'incorrect facts furnished by UNOG Administration'."

The JAB adopted its report on 28 June 2002. Its considerations, conclusions and recommendations read, in part, as follows:

"**Considerations**

...

37. With regard to the Appellant's argument referring to two alleged precedents, the Panel wished to specify that only three language teachers have retired since 1984, and that none of them received any paid days of annual leave or were kept on board on purpose until the end of a break following a term.

...

42. ... [T]he Panel agreed with the position of the Chief, Rules and Regulations Unit, OHRM, who stated that as staff members, language teachers are entitled to payment of accrued annual leave. Based on paragraph 40, the Panel was of the view, however, that the provisions of staff rule 105.1 in conjunction with staff rule 109.8, namely that the payment of annual leave accrued under staff rule 105.1 is limited to a maximum of 60 days (staff rule 109.8), does not apply to language teachers, given their specific contractual arrangements.

43. It highlighted that although staff members, language teachers have *de facto* 13 weeks of annual leave, i.e. 5.5 days a month, contrary to other staff members who are granted 6 weeks of annual leave, i.e. 2.5 days a month. This disparity is reflected by a corresponding proportional difference between the amounts of average ... salaries ...

...

Conclusions and Recommendations

45. In view of the foregoing, the Panel **concludes** that the Appellant, as staff member, is entitled on separation to the amount corresponding to the accrued annual leave from 1 January 2000 to 7 April 2000, date of her retirement, taking into account the fact that language teachers have 5.5 days per month of annual leave, and that the Appellant took 3 days at the beginning of January.

46. Hence, the Panel **recommends** to the Secretary-General that the Appellant be granted the equivalent amount of 15 days of annual leave, in compensation of the annual leave she did not take and to which she is entitled.

47. The Panel also **recommends** that this calculation method, based on Administrative Instruction ST/AI/316 ..., be implemented to all language teachers who separate from the Organization before the end of the calendar year, i.e. 31 December of each year."

On 12 February 2003, the Applicant received her final salary from the Organization. According to the Respondent, payment was effected, notwithstanding the lack of a signed P-35 form, "for humanitarian reasons".

On 17 April 2003, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

> "The Secretary-General regrets that he cannot agree with the JAB's view that leave taken by language teachers in excess of the annual leave entitlement provided for in the Staff Rules constitutes annual leave. In that regard, he points out that Appendix F to the Staff Rules expressly provides that such leave is treated as special leave with pay, *not* annual leave. Accordingly, the Secretary-General cannot accept the JAB's conclusions that the payment of annual leave to language teachers should not be limited to a maximum of 60 days, or that you were entitled to 15 days of annual leave for which you should be compensated. The Secretary-General has decided to maintain the contested decision and take no further action on your appeal."

On 22 May 2003, the Applicant was paid her annual leave balance of a total of 5.5 days, in accordance with the Secretary-General's decision.

On 16 July 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB correctly calculated the language teachers' annual leave as 5.5 days per month. The Applicant is entitled to payment on this basis, with interest at 8 per cent.

2. UNOG violated the Staff Regulations and Rules and the contracts held by the language teachers.

3. The Applicant should be compensated for the material and moral injury occasioned by the Organization's delay in paying her final salary, leave entitlements and pension.

4. The Applicant is entitled to an award of costs and legal expenses.

Whereas the Respondent's principal contentions are:

1. Leave during the summer recess and scheduled breaks between the three terms included in the language teachers' yearly work schedule, in excess of the annual leave entitlement provided in the Staff Rules, does not constitute annual leave.

2. The Administration did not violate the Staff Regulations and Rules or the language teachers' contracts.

3. The Applicant's claims for damages and the award of costs are without merit.

The Tribunal, having deliberated from 29 October to 24 November 2004, now pronounces the following Judgement:

I. This case contests a decision of the Secretary-General dated 17 April 2003, concerning the method used to calculate the annual leave of language teachers. According to that decision, leave during the summer recess and scheduled breaks between the three terms included in the language teachers' yearly work schedule, in excess of the annual leave entitlement provided in the Staff Rules, does not constitute annual leave.

II. The Applicant entered the service of the UNOG on 16 January 1978, as a Russian teacher in the Training and Examination Section on a fixed-term contract. Between 1978 and 1989 she was granted a number of further fixed-term contracts in the same post. The Applicant received a permanent appointment on 1 January 1990. The Applicant's date of retirement was 29 February 2000 but her appointment was extended until 7 April 2000. On 27 March 2000, the Applicant requested payment of the pro-rata amount of paid leave prior to her retirement which corresponded to the three months of the winter term 2000 (10 January - 7 April). The request was turned down by the Administration in a memorandum dated 3 April 2000. On 24 August 2000, the Applicant lodged an appeal with the JAB, which declared in her favour and awarded her the pro-rata amount of paid leave. When the Secretary-General rejected the recommendation of the JAB, the Applicant appealed to the Administrative Tribunal.

III. On the one hand, the Applicant contests the Secretary-General's submission that the leave of language teachers during the summer recess and scheduled breaks between terms, in excess of the annual leave entitlement provided for in the Staff Rules, is treated as "special leave with pay" and not as "annual leave", and requests the Tribunal to order the United Nations to pay the sums overdue. Pursuant to staff rule 105.1, staff members shall accrue annual leave at the rate of six weeks of annual leave a year, i.e., 2.5 days per month. Nonetheless, Appendix F expressly states that the yearly schedule of work of language teachers consists of three terms of 13 weeks each; consequently, they have *de facto* 13 weeks of leave. The Applicant maintains that, in accordance with Appendix F of the Staff Rules and with General Assembly resolution 38/234 of 20 December 1983 concerning, inter alia, the contractual status of language

teachers, any leave taken during the 13 weeks of breaks constitutes annual leave. Indeed, she claims that the seven weeks in excess of the annual leave provided for in the Staff Rules must also be classified as such. In her opinion, language teachers are entitled to 5.5 days of annual leave per month as opposed to the 2.5 days per month granted to other staff members of the United Nations. The Applicant contends that this disparity is reflected by a corresponding proportional difference between the amounts of average salaries per annum of the two categories of United Nations personnel, with language teachers receiving a lower salary. The Applicant claims, therefore, that at the time of her separation, she was entitled to compensation for 15 days of annual leave accrued during the period January to April 2000 (having taken three days of leave in January 2000).

IV. What then is the basis for the Applicant's claim, as a language teacher, to seven more weeks of annual leave than other United Nations staff members? Appendix F of the Staff Rules provides as follows: "There is a summer recess and there are scheduled breaks between terms. Leave taken during the recess and the breaks in excess of the annual leave entitlement provided in the Staff Rules is treated as special leave with pay."

The Applicant claims that Appendix F of the Staff Rules does not state that leave taken during the summer recess and the scheduled breaks in excess of the annual leave entitlement provided for in the Staff Rules *does not constitute annual leave*. It is her contention that, on the contrary, Appendix F specifies that "teachers are entitled not only to the annual leave provided by [the] Staff Rules but also to leave between recess and breaks". The Applicant contends that this latter type of leave is defined as annual leave in A/C.5/38/41, "Contractual status of language teachers", of 18 November 1983, as approved by General Assembly resolution 38/234. Paragraph 20 of A/C.5/38/41 stipulates:

> "Their [language teachers] conditions of service would be covered in a new appendix to the Staff Rules to reflect their yearly schedule of work as compared to that of other United Nations staff, the annual leave in excess of their entitlement under the Staff Rules being treated technically as leave with pay."

V. In analysing the Applicant's claims, the Tribunal recalls, firstly, staff rule 105.1 whereby "staff members shall accrue annual leave while in full pay status at the rate of six weeks a year". The Tribunal declares that the problem lies in the interpretation of Appendix F and the Secretary-General's proposals in A/C.5/38/41 as

approved by General Assembly resolution 38/234 concerning the specific issue of language teachers' leave.

VI. Regarding the interpretation of Appendix F, the Tribunal, in agreement with the Respondent's position, considers that the provision in Appendix F clearly indicates that leave taken during the summer recess and the scheduled breaks between terms, in excess of the annual leave entitlement provided for in the Staff Rules, is treated as *special leave with pay*. Consequently, the Applicant's claim that this provision indicates that language teachers are entitled to both (normal) annual leave under the Staff Rules and (special) annual leave taken during the summer recess and scheduled breaks between terms, since the provision does not expressly stipulate that the latter type of leave is not annual leave, has no basis in law.

VII. By the same token, the Tribunal considers that A/C.5/38/41 clearly provides that language teachers' leave taken during those breaks, in excess of the six weeks of annual leave provided for in the Staff Rules, must be considered special leave with full pay and not annual leave. While the Applicant draws attention to the terms "annual leave" and "treated technically as" used in that text as meaning that such leave qualifies as "annual", the Tribunal considers it to be a semantic interpretation submitted by the Applicant which does not take account of the circumstances in the case and the teleological approach. Had the General Assembly intended for such leave to be treated as annual leave, it would have clearly indicated this. If such had been the case, it would have had to address other issues affected by that classification, for example, it would have had to decide whether language teachers would be entitled to accrue such leave and whether they would be entitled to receive pro-rata payment of such accrued leave in accordance with staff rule 109.8. Given that none of these issues was mentioned in the report of the Secretary-General or in the General Assembly resolution approving that report, the Tribunal considers that the leave in question was not intended to constitute annual leave.

VIII. On the other hand, the Applicant requests the Tribunal to consider the Administration's responsibility for the delays in processing her final entitlements at the time of her retirement from the United Nations on 7 April 2000, which had been prejudicial to her. Her claim is that the payments of her pension, final salary and accrued annual leave pursuant to staff rule 105.1 were delayed in violation of the Staff Regulations and Rules and the language teachers' contract. The Applicant also claims

that the delay "amounts to an abuse of authority" and that the particular circumstances in this case

> "manifest a consistent pattern of arbitrariness and a concerted effort on the part of the Administration to take advantage of [the Applicant's] dependence on regular monthly payments, with the aim to force [her] to forego [her] rights or suffer the considerable inconveniences of prolonged absence of any income".

She therefore requests that she be awarded compensation for the injury incurred and the appropriate interest thereon at the rate of 8 per cent a year on those three delayed payments.

IX. In defence, the Respondent submits on the subject of payment of the Applicant's final entitlements that the Administration acted in accordance with administrative instruction ST/AI/155/Rev.2 of 31 August 1990, entitled "Personnel Payroll Clearance Action". This Instruction requires the staff member to recognize, by signing personnel payroll clearance action form P.35, that he or she has received a copy of that Instruction and has duly noted the content of section I of the form before any payment can be made in his or her favour. The Respondent points out that the Applicant refused to sign the form, so that payments of her pension and other outstanding amounts could not be processed sooner.

X. In evaluating the Applicant's claim, the Tribunal will take account of ST/AI/155/Rev.2. The Instruction sets out the guidelines and procedures to be followed when a staff member retires in order to ensure that all outstanding obligations, liabilities and entitlements of the staff member have been properly recorded and settled. Paragraph 3 stipulates that "[t]he standard form used in the implementation of the procedures under reference is the personnel payroll clearance action form P.35". The provisions of the Instruction, notably paragraphs 11, 12 and 13, specify the staff member's obligations and those of the Organization with regard to the P.35 form. The Tribunal notes that the fact that staff members are required to sign their completed P.35 form is a logical fulfilment of those obligations. A staff member's signing of the P.35 form is therefore a prerequisite for the settlement of his or her entitlements upon retirement. Since the Applicant refused to sign the form, the Tribunal upholds the Respondent's claim that the Administration was justified in refusing to make such payments.

XI. Nevertheless, the Applicant also complains that the P.35 form she was given "had no indication of accrued annual leave [she was] entitled to under staff rule 105.1, no date and no signature of the Administrative Officer" and that, therefore, "the P.35 form was improperly recorded, inaccurate and incomplete". The Tribunal observes, on the one hand, that the staff member's disagreement with the content of the form does not exempt her from the general obligation to sign it in order to be able to receive the benefits deriving from her service with the United Nations. On the other hand, the Tribunal emphasizes that the staff member's signature does not deprive her of the possibility of challenging a contested component of its content or pursuing her action. The Tribunal points out that the Administration must ensure that a staff member's signing of the P.35 form is not considered as the signing of a general release from the Organization's obligations towards the staff. It is in the interest of the United Nations to protect the rights and interests of its staff and to process their benefits promptly and effectively. The Tribunal notes that it was in that spirit that the Administration eventually made certain payments in the Applicant's favour for "humanitarian reasons" without her having signed the form. Although the Tribunal considers the delays regrettable, it finds that they were caused by the Applicant's actions and that no compensation is therefore due to her.

XII. In conclusion, regarding the Applicant's contention that the delay in the payments of her pension, final pay and accrued annual leave "amounts to an abuse of authority", the Tribunal declares that the burden of proving that abuse of authority, bias, arbitrariness or other improper motivation or extraneous factors prompted the decision, lies with the Applicant. One may cite, as an example, the case of *Fagan* (Judgement No. 554, 1992), in which the Tribunal ruled as follows:

> "Accordingly, an Applicant alleging that a discretionary administrative decision is tainted by prejudice or improper motivation must adduce convincing evidence. The Tribunal concurs with the JAB's conclusion that the Applicant has not discharged the burden of proving discrimination, unfairness or improper motivation ..." (para. 11).

The Tribunal notes that the Applicant has not adduced evidence in support of her contention of abuse of authority, arbitrariness of the decision or any other improper motivation in the case.

XIII. Lastly, the Applicant has not successfully discharged the burden of proving improper action on the part of the Administration. Indeed, she has not convinced the Tribunal that the Administration violated her rights in any way whatsoever.

XIV. For the foregoing reasons, the Tribunal rejects the Application in its entirety.

(Signatures)

Brigitte **Stern**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Dayendra Sena **Wijewardane**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Secretary